



FH
[REDACTED]

**STATE OF WISCONSIN
Division of Hearings and Appeals**

In the Matter of

[REDACTED]

DECISION

BCS/145494

PRELIMINARY RECITALS

Pursuant to a petition filed November 21, 2012, under Wis. Stat. § 49.45(5)(a), to review a decision by the Winnebago County Department of Human Services in regard to Medical Assistance, a hearing was held on January 23, 2013, at Oshkosh, Wisconsin. Post-hearing the record was held open to allow petitioner and respondent to submit additional supporting documentation. Documents were timely received from both parties.

The issue for determination is whether the county agency correctly discontinued the petitioner's BadgerCare Plus (BCP) coverage due to nonfinancial ineligibility.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

[REDACTED]

Respondent:

Department of Health Services
1 West Wilson Street
Madison, Wisconsin 53703

By: Janet Hertzberg

Winnebago County Department of Human Services
220 Washington Ave.
PO Box 2187
Oshkosh, WI 54903-2187

ADMINISTRATIVE LAW JUDGE:

Peter McCombs (telephonically)
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # [REDACTED]) is a resident of Winnebago County.

2. The county agency seeks to end the petitioner's FS benefits because it contends that he (1) failed to timely provide verification of the living arrangements with his minor children and (2) he does not have physical placement of his minor children 40% of the time.
3. The petitioner and SB have joint custody of their twin daughters. Petitioner's daughters stay ed with him at least every other day, commencing in the afternoon and staying with him through the next morning. His daughters stayed with their maternal grandmother, TB, when not staying with petitioner. Exhibit 5. He presently has physical placement of his children 50% of the time. Exhibit 2 and Exhibit 5.
4. There is no court order regarding the present placement of petitioner's minor children.

DISCUSSION

BadgerCare Plus is an expansion of the Wisconsin Medical Assistance program meant to provide insurance for children under 19 and their parents. *BadgerCare Plus Eligibility Handbook (BCPEH)*, 1.1. In the instant case, the county agency determined that the petitioner was not eligible for BadgerCare Plus. The agency's reasoning was that he did not meet a BCP *nonfinancial* eligibility requirement because he did not have at least 40 percent placement in his household of a child under age 18, and did not timely present proof to the contrary. The agency relied on the following BCP policy directive:

2.2.1.2 Joint Placement

When the natural or adoptive parents of a child do not live together, and have joint placement arrangements for the child (through a mutually agreed upon arrangement or court order), only one parent can be determined eligible at a time unless there is reasonably equivalent placement. Reasonably equivalent placement means that the child is residing with each parent at least 40% of the time during a month.

If the child is not residing with both parents at least 40% of the time, only the parent with the greater percentage of the placement time may apply on behalf of the child and/or for him or herself as the caretaker relative of that child.

If only one parent of a child is applying for BC+ and he or she is stating that they have placement of the child for at least 40% of the time, accept the declaration unless it is questionable.

If both parents are applying for BC+ and claim the child is residing with them, act on their BC+ cases as follows:

1. If both parents agree that they have a reasonably equivalent placement arrangement, ask under which parent's case they want the child to be receiving BC+ benefits and determine eligibility for both parents' cases.
2. If either parent disputes that the placement arrangement is reasonably equivalent, the eligibility worker must determine the monthly percentage of the physical placement based on the court order. If the court order does not show reasonably equivalent placement, consider the child to be with the parent s/he is residing with during the month in question and deny the other parent's eligibility as a caretaker relative of this child.
3. If the parents can not agree on which case the child will receive benefits, put the child on the case with the family whose income is at the lower FPL level.

4. Document your decision in the case record.

In determining eligibility for the parents with equivalent placement, the child is considered to be residing in both of their homes. That means the child will be included in the group size for both cases and the child's income will also be counted in both cases.

If reasonably equivalent placement exists (as described above) and both parents apply for BadgerCare Plus for the child and the child has access to health insurance where an employer pays 80% or more of the monthly premium in one home but not the other, the child shall remain eligible for BadgerCare Plus on the case with the parent who does not have access to health insurance for which the employer pays 80% or more.

BCPEH, 2.2.1.2 (emphasis added).

It is a well-established principle that a moving party generally has the burden of proof, especially in an administrative proceeding. *State v. Hanson*, 295 N.W.2d 209, 98 Wis. 2d 80 (Wis. App. 1980). The court in *Hanson* stated that the policy behind this principle is to assign the burden to the party seeking to change a present state of affairs.

I find it important to note that the 40% placement test for "reasonably equivalent placement" does not even come in to play if the other parent is not applying for or receiving BCP. It is only triggered when both parents seek MA. When only one parent of a minor has applied for MA and has a joint custody and placement arrangement that provides for some residence of the child with the applicant parent, then that parent may be MA eligible regardless of the placement percentage. The record does not indicate that SB is receiving BCP benefits.

The petitioner has testified that he has at least 50/50 placement of his daughters, and that SB has been incarcerated and had other legal issues that have resulted in his placement time exceeding 50% at times. The petitioner has provided a statement purportedly signed by SB and petitioner, which acknowledges the 50/50 placement of their daughters. The petitioner has also provided a January 25, 2013, notarized statement from SB's mother, TB, which again acknowledges the 50/50 placement of the girls since approximately September, 2012. TB writes that petitioner used to take the girls during her 3rd shift work hours, and notes that "[h]e is now picking them up in the afternoon and taking them all day and over night.

Respondent counters that petitioner did not timely provide verification of the physical placement and did not have at least 40% physical placement. Electronic Case comments and email correspondence from ██████████ ██████████ was provided in an attempt to lay a foundation for these allegations.¹ Ms. ██████████ writes that both SB and TB told her in October of 2012, that petitioner did not have the girls 50% of the time.² Ms. ██████████'s statement does not indicate whether his daughters were with petitioner at least 40% of the time.

The statements presented post-hearing directly contradict one another. The respondent has the burden of proof, and I cannot find that it has demonstrated by a preponderance of the evidence that it has complied

¹ Ms. ██████████'s relationship to this case is unclear, based upon the record. She did not testify at hearing. She noted in her email that she "...had an open case regarding the mother of the children, [SB] from 08/17/12 until 10/24/12." Exhibit 6.

² Ms. ██████████ also writes repeatedly that TB's home has children's toys and clothing present. Since petitioner has testified that the girls were staying with TB regularly, I find this information unremarkable. In similar fashion, claims attributed to SB of fraud by petitioner contained in Exhibit 6 completely unsubstantiated and constitute multiple levels of hearsay.

with BCP rules regarding verification. The BCP Eligibility Handbook address verification requests and instructs the respondent to:

Use information available to process the application or change within the time limit and issue benefits when the following two conditions exist:

1. The applicant/member does not have the power to produce verification, and
2. Information is not obtainable timely even with your assistance.

Do not deny eligibility in this situation, but continue in your attempts to obtain verification. When you have received the verification, you may need to adjust or recover benefits based on the new information. Explain this to the applicant/member when requesting verification.

See, BadgerCare Plus Eligibility Handbook, §9.8. Petitioner testified that he had difficulty obtaining a signed statement from SB, which he sought in light of the lack of a court placement order. The statement from SB in the record is undated. However, the respondent has presented no testimony or copy of a verification request notice. Electronic Case Comments dated October 18, 2012, reference a telephone call from petitioner asking what kind of verification would be needed. This would imply that petitioner was aware of the need for verification, but it does not tell me whether the respondent was made aware of any difficulties that petitioner was having in obtaining proof or whether any assistance was provided by respondent. Furthermore, the Case Comments do not state any deadline for supplying the proof. BCP Handbook provisions indicate that verification should be supplied by the 11th day after requesting verification or the end of the review month whichever is later. BadgerCare Plus Eligibility Handbook, §9.3. I have no idea when the deadline was in this case. Based upon this record I cannot find that petitioner failed to timely submit required verification.

All statements provided post-hearing leave much to be desired from an evidentiary standpoint. None of the authors of the statements participated in the hearing, and therefore their statements never faced scrutiny or questioning. I have signed statements from SB and TB that directly contradict the comments regarding the physical placement of the girls that were attributed to SB and TB in an email written by Ms. [REDACTED]. See, Exhibit 6. I now have the unenviable task of weighting the evidence in a foundational vacuum.

Neither the statement of SB, nor that of Ms. [REDACTED] is notarized; while I have no reason to believe that either of those statements was forged or invalid, I do note that the statement of TB is notarized. This added level of proof gives certain weight to the validity of TB's statement. It should be noted that TB's notarized statement is completely at odds with the comments attributed to TB by Ms. [REDACTED] and I am unable to determine if TB is telling the truth now, was telling the truth to Ms. [REDACTED] last fall, or if Ms. [REDACTED]'s memory of TB's October statements is incorrect. I do feel comfortable in finding that TB's statement was, in fact, signed by TB. Furthermore, TB's statement completely corroborates petitioner's testimony at hearing regarding the times that he has physical placement of his daughters.

Simply put, I find that petitioner's evidence outweighs the evidence presented by the respondent. This was a very close case due to the lack of evidence, and it is unfortunate that neither the respondent nor the petitioner presented TB, SB, and/or Ms. [REDACTED] as testifying witnesses. Respondent provided scant evidence to support its actions and/or conclusions here. As such, I conclude that respondent has failed to prove by a preponderance of the evidence that petitioner does not have physical placement of his minor daughters at least 40% of the time.

CONCLUSIONS OF LAW

1. Respondent has failed to demonstrate by a preponderance of the evidence that petitioner failed to provide requested verification in a timely fashion.
2. The petitioner was non-financially eligible for BCP from at least September, 2012, to the present, because he had at least 40% physical placement with his minor daughters.

NOW, THEREFORE, it is ORDERED

That the petition herein be remanded to the respondent with instructions to reinstate the petitioner's BCP eligibility in accord with the Conclusion of Law above. This action shall be taken within 10 days of the date of this Decision.

REQUEST FOR A REHEARING

This is a final administrative decision. If you think this decision is based on a serious mistake in the facts or the law, you may request a rehearing. You may also ask for a rehearing if you have found new evidence which would change the decision. Your request must explain what mistake the Administrative Law Judge made and why it is important or you must describe your new evidence and tell why you did not have it at your first hearing. If you do not explain these things, your request will have to be denied.

To ask for a rehearing, send a written request to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875. Send a copy of your request to the other people named in this decision as "PARTIES IN INTEREST." Your request for a rehearing must be received no later than 20 days after the date of the decision. Late requests cannot be granted.

The process for asking for a rehearing is in Wis. Stat. § 227.49. A copy of the statutes can be found at your local library or courthouse.

APPEAL TO COURT

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be served and filed with the appropriate court no more than 30 days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one).

For purposes of appeal to circuit court, the Respondent in this matter is the Department of Health Services. After filing the appeal with the appropriate court, it must be served on the Secretary of that Department, either personally or by certified mail. The address of the Department is: 1 West Wilson Street, Madison, Wisconsin 53703. A copy should also be sent to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400.

The appeal must also be served on the other "PARTIES IN INTEREST" named in this decision. The process for appeals to the Circuit Court is in Wis. Stat. §§ 227.52 and 227.53.

Given under my hand at the City of Madison,
Wisconsin, this 15th day of February, 2013

\sPeter McCombs
Administrative Law Judge
Division of Hearings and Appeals



State of Wisconsin \DIVISION OF HEARINGS AND APPEALS

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The preceding decision was sent to the following parties on February 15, 2013.

Winnebago County Department of Human Services
Division of Health Care Access and Accountability